BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HECTOR ROJAS Claimant VS. **PAWNEE EXTRUSIONS, INC.** Respondent AND **LEGION INSURANCE COMPANY** Insurance Carrier	)	Docket No. 183,588

ORDER

Claimant requested review of the Award entered by Special Administrative Law Judge William F. Morrissey entered in this proceeding on July 12, 1995. The Appeals Board heard oral argument on November 14, 1995.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Heather Nye of Overland Park, Kansas.

RECORD AND STIPULATIONS

The record reviewed by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 3 percent functional impairment rating. Claimant requested this review and asks the Appeals Board to review the issue of nature and extent of disability. In its brief to the Appeals Board, the respondent raised the issue of whether claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent. Therefore, those two issues are the only issues now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Special Administrative Law Judge should be affirmed.

The Appeals Board adopts the conclusions and analysis of the Special Administrative Law Judge. The Appeals Board finds that claimant did sustain personal injury by accident arising out of and in the course of his employment with the respondent on September 23, 1993. The Appeals Board also finds that claimant unreasonably refused to perform accommodated work provided by the respondent. Therefore, claimant should receive permanent partial disability benefits based upon his functional impairment rating only.

The principal issue in this proceeding is whether the work respondent provided to claimant immediately before his termination on May 19, 1994 accommodated claimant's work restrictions and limitations. The Appeals Board finds that it did.

Regarding claimant's permanent work restrictions and physical abilities, the Appeals Board finds the testimony of board-certified orthopedic surgeon, Robert Eyster, M.D., who treated claimant during the months of February through May 19, 1994 for low back strain, to be credible and persuasive. Based upon his knowledge of claimant's condition, Dr. Eyster believes that claimant could perform the accommodated job that respondent provided to claimant in May 1994 when he returned to work after recovering from his work-related accident.

Dr. Eyster initially issued permanent work restrictions and limitations to claimant on May 13, 1994 when he released claimant to return as needed with the admonishment that claimant could occasionally lift 50-60 pounds using proper lifting techniques and that he should limit repetitive lifting to 35 pounds. At the time of that release, the doctor also felt claimant should not work bent over. Claimant returned to Dr. Eyster on May 18, 1994 complaining that he could not perform the job duties respondent had assigned him. Based upon those complaints, Dr. Eyster lowered the 35 pound lifting restriction to 20 pounds. After receiving the 20 pounds lifting restriction, the respondent telephoned Dr. Eyster on May 19, 1994 and described claimant's job. After considering that job description, Dr. Eyster concluded that claimant could perform that work.

Based upon the testimony of Jason Carnahan, the assistant foreman and claimant's supervisor on May 18 and 19, 1994, the Appeals Board finds respondent assigned claimant to operate a machine on one of the easiest and slowest lines in respondent's plant. On May 19, 1994, claimant refused to perform the assigned job and left the plant despite Mr. Carnahan reviewing with claimant Dr. Eyster's opinion that claimant could perform the job in question.

The Appeals Board finds claimant sustained low back strain while working for the respondent in September 1993. Because his is an "unscheduled injury", claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee

> is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

However, because claimant has voluntarily refused to perform accommodated work provided by the respondent which could be performed without violating his work restrictions and earn comparable wage, the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), is applicable. Although Foulk deals with work disability under the former provisions of K.S.A. 44-510e, its rationale is still applicable for injuries occurring after July 1, 1993. In Foulk, the Court of Appeals said:

> "Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system." (*Syl*. ¶ 4.)

Because the rationale of Foulk is applicable, the Appeals Board finds claimant is entitled to receive permanent partial disability benefits based upon his functional impairment only which the Special Administrative Law Judge found to be 3 percent. As indicated by Dr. Eyster, claimant has an impairment to the body in the range of 0-5 percent should claimant's complaints be legitimate. In addition, board-certified physiatrist Jane K. Drazek, M.D., who examined claimant at his attorney's request in June 1994, testified that claimant has a 3 percent whole body functional impairment as a result of his low back strain. The Appeals Board adopts the 3 percent functional impairment rating found by the Special Administrative Law Judge.

At oral argument respondent's counsel stated the parties had entered into a stipulation that claimant's functional impairment was 1.5 percent. The evidentiary record is devoid of such stipulation. Neither the award nor the parties' submission letters list such stipulation, nor does a review of the Division's administrative file reveal its existence.

The findings of the Special Administrative Law Judge as set forth in the Award are adopted by the Appeals Board to the extent they are not inconsistent with the findings specifically made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated July 12, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Heather Nye, Overland Park, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director